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Supreme Court of the United States

OCTOBER TERM, 1959

No. 414

CHARLES A. COLLINS, PETITIONER,

versus

THE STATE OF SOUTH CAROLINA, RESPONDENT

PETITION FOR A WRIT OF CERTORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

C. T. GRAYDON,
AUGUSTUS T. GRAYDON,
Columbia, S. C.
JOHN K. DeLOACH,
Camden, S. C.,
Attorneys for Petitioner.

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THE STATE OF SOUTH CAROLINA, RESPONDENT

PETITION FOR A WRIT OF CERTORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of South Carolina entered on June 26, 1959.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of South Carolina was issued June 26, 1959, and will be reported in Southeastern Reporter Second (West) and South Carolina Reports. It is printed with this Petition as Appendix A.

JURISDICTION

The jurisdiction of this Court is involved under 28 U. S. C., Section 1257 (3), and, in accordance with Rule 23 (1) (f), the question presented in this Petition was raised at the outset of the trial (See Record, p. 3), at the conclusion of the case for the State (See Record, p. 44), at the conclusion of the case (See Record, p. 178), and in the Exceptions (See Record, pps. 187-192, Exceptions 1).

QUESTION PRESENTED

The sole question presented is whether the South Carolina Court of General Sessions (Criminal Division) had jurisdiction of the Defendant on a non-support charge.

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner contends that he has been denied his right under Article III, Section 2 of The United States Constitution which guarantees that the trial of a Defendant "shall be held in the State where the said crimes shall have been committed".

The Petitioner likewise contends he was denied the protection of the Sixth Amendment of the United States Constitution which guarantees that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district **wherein the crime shall have been committed**".

Finally the Petitioner contends that he has been denied the protection of the Fourteenth Amendment which prohibits the several States from "depriving any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

But a single question is presented: Was Petitioner tried by a Court without jurisdiction of the crime?

STATEMENT

Petitioner was married to one Marilyn Perry of Kershaw, South Carolina, on September 1, 1957. For about a year they lived in various places while the Petitioner attended school; they actually spent nine months in Buie's Creek, North Carolina, where the Petitioner attended Campbell College.

In September, 1958, this couple moved to Athens, Georgia, where the Petitioner was to attend the University of Georgia. They arrived in Athens on September 17. On September 23 Mrs. Collins left their partially furnished apartment to go to her mother's home in Kershaw, South Carolina. She wrote a note on that date in which she said she would be back when the Petitioner had a place for her (Ex. A, R., p. 193). On the 25th she wrote again saying she would wait to return, "until the trailer comes" (Ex. B. R., p. 194), and on the following date (the 26th) she said: "I'm not leaving you even though your mother thinks I should" (Ex. C. R., p. 195).

An indictment for non-support was returned by the Grand Jury of Kershaw County, South Carolina, in February, 1959, charging the Petitioner with non-support of his wife and a child who was born on November 20, 1958, in Kershaw County, South Carolina. The couple had last lived together as man and wife in Athens, Georgia (R., p. 9).

The child was born in South Carolina almost two months after the wife left the Petitioner who remained in Georgia. The Petitioner said he "tried to talk her into coming back as soon as she left . . ." (R., p. 59). On October 4th the wife and her mother came to Athens and the wife stated that, "she would come back when the trailer came" (R., p. 71). Thereafter the wife and her mother refused to talk to Petitioner, and he found out about the birth of his child through a friend (R., p. 73). Finally the Petitioner

stated: "I exhausted every conceivable effort to get her back" (R., p. 74).

The Petitioner reiterated on the stand during the trial that he wanted his wife and child to return to him (R., p. 75). The Petitioner has continued to maintain his residence in Georgia where he is a student at the University of Georgia. But the wife and child have continued to reside with her mother in Kershaw County, South Carolina.

The Petitioner was indicted on a charge of non-support in a County in which he had never lived and in which the wife lived with her family prior to their marriage. His trial resulted in a verdict of guilty, and the trial Judge assessed the maximum penalties against Petitioner.

Proper objections were made at the outset of the case and at each stage of the proceedings to the jurisdiction of the Court. Those objections were based on the lack of jurisdiction of the South Carolina Court to try a defendant for a crime which began and continued in the State of Georgia.

REASONS FOR GRANTING THE WRIT

The general principles as to the obligation of a father for the support of his wife and his minor child or children are well recognized. The Petitioner in this case has no desire to avoid his conjugal and parental obligations.

But in this instance he has been denied any rights whatsoever in the child which is admittedly his. Can he be required to support his wife and child by a Court which was without jurisdiction in the first place?

It is our view in this Petition (as it has been throughout the South Carolina proceedings) that the Courts of Georgia were (and are) the proper forum to adjudicate the question of non-support against the Petitioner. That was

the State in which the wife left the Petitioner; whether that leaving was justified or not is a Georgia question.

The South Carolina Courts cannot acquire a jurisdiction which that Court never had by legal semantics or judicial legerdemain. Both South Carolina and Georgia say that a husband who is without fault cannot be subjected to criminal prosecution for non-support.

But South Carolina never had jurisdiction in this case, and this lack of jurisdiction presents a constitutional question for decision by this Court.

Why then does petitioner contend South Carolina had no jurisdiction?

It is true that South Carolina claimed jurisdiction, and South Carolina's highest court affirmed that view. But the jurisdiction was not based on a proper application of the law—and any conflict between South Carolina and Georgia in the question is more apparent than real.

That the State in which a **deserted** wife and child are domiciled has a deep concern in the welfare of the family is apparent. *Esenwein v. Pennsylvania*, 89 L. Ed. 1608. Against this principle must be placed the right of a Defendant facing criminal penalties to trial in accordance with the constitutional principles to which we have already referred. South Carolina does not have jurisdiction because the trial of the criminal case in South Carolina amounted to an adjudication of the support case. South Carolina's jurisdiction could only be based on the assumption that the wife was justified in leaving Georgia, the marital domicile of these parties when she broke up the marriage.

The issue which was submitted to the jury in Kershaw County was one which should properly have been considered by a Georgia jury.

The decision of the Judge in Kershaw County to allow the trial there to proceed amounted to a determination that

the Petitioner had been guilty of misconduct in Georga. That determination was made on the warrant and indictment alone. That such a determination was made in advance of the trial is shown by the Supreme Court of South Carolina's finding:

> "The Appellant first breached his duty to contribute to the support of his wife and child in Kershaw County, and we think he was properly indicted in said County for this omission."

If the indictment was proper, then the Petitioner was already adjudged guilty. That judicial decision had only to be affirmed by the jury to subject the Petitioner to criminal penalties.

Under the Georgia law, a minor may acquire a domicile apart from the father if he has "voluntarily relinquished his parental authority". *Yarborough v. Yarborough*, 290 U. S. 202, 78 L. Ed. 172, 54 S. Ct. 181, 90 A. L. R. 924. And as this Court remarked in the *Yarborough case*:

> "The character and extent of the father's obligation and the status of the minor, are determined ordinarily not by the place of the minor's residence but by the law of the father's domicile."

This view of the law is not out of accord with the law in South Carolina. In *State v. Hellams*, 209 S. C. 141, 39 S. E. (2d) 212, the South Carolina Court said:

> ". . . The established law in this State is that where a husband is providing a home, and the necessaries of life therein for his wife and minor, unmarried children, and the wife without just cause or excuse leaves that home and takes such minor children with her, and without just cause or excuse refused the husband the custody of the children, then the duty no longer devolves upon him to support either."

It is our view that jurisdiction in this case would be only in the State of Georgia. That State has a statute simi-

lar to the South Carolina Statute (Ga. Code Ann. Supp., No. 74-9902). In *Weltzbarger v. State,* 89 Ga. App. 765, 81 S. E. (2d) 301, the Georgia Court said in a similar case:

> ". . . Since the original abandonment in the case at bar occurred—insofar as can be concluded from the record here—in Florida in 1949, the venue of the offense, it being continuing in nature, is in the State of Florida, rather than in the State of Georgia. Since there was, after 1949, no resumption of parental rights or duties (there were contributions of the $120.00 about three years prior to this action not being sufficient in law to constitute a return to the discharge of parental duties), the abandonment has been continuous since the 1949 separation, and the venue of this offense lies in Florida rather than in Georgia. . . ."

This rule is not out of accord with the South Carolina rule, as set out in *State v. Nesmith,* 185 S. C. 341, 194 S. E. 160. In that case a defendant sought to avoid prosecution in South Carolina on the grounds that the offense took place in North Carolina, the state to which the wife and child had gone. But South Carolina rejected that contention and said that jurisdiction properly lay in Florence County . . . "for it was in that county, according to this evidence, he first breached his duty to contribute to their support."

Further in that case, the South Carolina Court said:

> "Any contention that, as the wife and child at that time were in Hamlet, N. C., the defendant should have been tried there, cannot be sustained. The offense was a violation of the laws of this State, not of the laws of North Carolina."

Thus it seems clear that this petitioner has been denied the right to be tried in the state in which the crime (if any) was committed—and that state was Georgia.

The duty to furnish support is not the only parental obligation prior to a divorce, alimony or custody proceed-

ing, for the duty of parental care and control devolves upon every parent.

But this father, whose child came into being after the mother had left Georgia, has never had his rights as to custody and control of the child adjudicated. It is true that the Courts generally favor custody in the mother, but the father should not be tried for non-support in a County in which he has never resided prior to any adjudication as to custody.

But some will say: should not this child receive support regardless of whether the father was at fault?

Perhaps the rule cited by the Minnesota Court in *State v. Washneshy*, 246 N. W. 366, is the proper rule:

> "The children are not responsible for the unfortunate differences which have caused the estrangement and separation of the parents and ought not to suffer therefrom. Their rights do not depend upon the degree of culpability of one or the other parent, and their needs must be provided for whether the existing conditions have been brought about by the fault of the one or the other or of both parents."

As the South Carolina Court said in *Koon v. Koon*, 203 S. C. 556, 28 S. E. (2d) 89:

> ". . . The primary consideration for the guidance of the Court is what is best for the child itself."

But these principles do not mean that the wife seeking support can shop for her forum; jurisdiction must be proper before a Court can act—regardless of the needs of a child or its mother.

There is a vast difference in the matter of jurisdiction **on the civil side** for a divorce and jurisdiction **on the criminal side** in an action for non-support.

The rules as to jurisdiction in divorce actions are governed by the statutes of the various States, and this Court

has said that each State must recognize divorces based on the jurisdictional requirements of another State.

But this non-support action is on the criminal side; it is in a sense auxiliary or ancillary to an action for custody and support on the civil side. Since the law gives the wife two legal barrels with which to shoot, it is our view that the criminal barrel should be fired only in accord with proper jurisdictional requirements.

This case presents a conflict of authorities as to jurisdiction in a non-support action. Petitioner had the right to rely on the Georgia law, and he cannot be hailed into South Carolina to answer for a purported omission which began and continued in Georgia.

It is not a legal sophistry or a judicial syllogism which we seek. This Petition is made because the Petitioner manifestly cannot obtain the justice which our Courts should give from a trial in the Court of his wife's choosing. A prophet may be without honor in his own land, but local citizens will invariably honor the native daughter who seeks support from an outlander who has purportedly done her wrong.

CONCLUSION

For the foregoing reasons; this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

C. T. GRAYDON,
AUGUSTUS T. GRAYDON,
Columbia, S. C.,
JOHN K. DeLOACH,
Camden, S. C.,
Attorneys for Petitioner.

September 9, 1959.

APPENDIX A

OPINION OF THE SUPREME COURT OF SOUTH CAROLINA

THE STATE, Respondent,

versus

CHARLES A. COLLINS, Appellant

Appeal from Kershaw County
J. Woodrow Lewis, Judge

Case No. 4470
Opinion No. 17547
Filed June 26, 1959

AFFIRMED

Moss, A. J.: Charles A. Collins, the appellant herein, was indicted, tried and convicted at the February, 1959, term of Court of General Sessions for Kershaw County, South Carolina, for failure to support his wife and child. The appellant was convicted of a violation of Section 20-303 of the 1952 Code of Laws of South Carolina, which provides:

> "Any able-bodied man or man capable of earning or making a livelihood who shall, without just cause or excuse, abandon or fail to supply the actual necessaries of life to his wife or to his minor unmarried child or children dependent upon him shall be guilty of a misdemeanor * * *"

The appellant and Marilyn Perry were ceremonially married at York, South Carolina, on September 1, 1957, each being eighteen years of age. They had met in the summer of that year at Myrtle Beach, South Carolina, where the wife was participating in a beauty contest. At the time of their marriage, the appellant had attended Campbell College at Buie's Creek, North Carolina, for one year, and a summer session at the University of North Carolina, and was living with his parents at Myrtle Beach, South Carolina. The wife had completed high school and was living

with her mother in Kershaw County, South Carolina. The appellant and his wife attended Campbell College for nine months, completing the 1958 term, and then went back to Myrtle Beach where they stayed for two or three weeks. They attended school at Presbyterian College in Clinton, South Carolina, for nine weeks during the summer term. After leaving summer school at Presbyterian College, they visited and stayed with the wife's mother in Kershaw County for a short period of time, and visited and stayed with the parents of the appellant at Myrtle Beach for a short period of time. In September, 1958, they went to Athens, Georgia, so that the appellant could enroll as a student and attend the University of Georgia. They had expected to live in a trailer to be purchased by Charles A. Collins, but because of the non delivery of the trailer they spent the first night in a hotel in Athens, Georgia, and the next two nights in the home of the owners of a trailer park where they had planned to put their trailer, It appears from the evidence that after staying at the home of the owners of the trailer park, that the appellant and his wife moved to an apartment, which was unfurnished, and was to be used by them until the arrival of their trailer. This apartment was partially furnished by the appellant and his wife so that it could be temporarily occupied. The wife had been in Athens, Georgia, with the appellant for about a week, and until September 23, 1958, when she left him and returned to the home of her mother in Kershaw County. At the time the wife left she was in the eighth month of pregnancy. Thereafter, on November 20, 1958, a son, Robert Perry Collins, was born of this marriage, in a hospital in Lancaster, South Carolina.

When this case was called for trial in the Court of General Sessions for Kershaw County, South Carolina, the appellant objected to the jurisdiction of the Court. The objection was upon the ground that the desertion, if any occurred, took place in the State of Georgia, and hence the court had no jurisdiction. It was further asserted that the undisputed facts in the case show that the appellant and his wife have never made their home in Kershaw County; that the place in South Carolina where the appellant lived

before marriage and which he called home after marriage was Myrtle Beach, in Horry County, South Carolina; that they were living temporarily in Athens, Georgia at the time the separation of the parties took place. The first question for determination is whether the Court of General Sessions of Kershaw County had jurisdiction to try this case.

The appellant asserts that under Art. III, Section 2 of the Constitution of the United States, the trial of all crimes shall be by a jury and shall be held in the State where said crimes shall have been committed. He further contends that under Art. I, Section 17 of the 1895 Constitution of South Carolina, that, "No person shall be held to answer for any crime * * * unless on a presentment or indictment of a grand jury of the County where the crime shall have been committed, * * *"

This Court has held that the offense of nonsupport is made by the Statute, Section 20-303, of the 1952 Code of Laws of South Carolina, a continuing one. *State v. Stone*, 111 S. C. 496, 98 S. E. 333, and *State v. Nesmith*, 185 S. C. 341, 194 S. E. 160.

In the case of *State v. Nesmith, supra*, this Court quoted with approval from 8 R. C. L., at page 310, Criminal Law, Section 336, the following:

> "Generally speaking, it is a fundamental rule of criminal procedure that one who commits a crime is answerable therefor only in the jurisdiction where the crime is committed, and in all criminal prosecutions, in the absence of statutory provision to the contrary, venue must be laid as in the county of the offense, and it must be proved as laid. Such an offense as desertion or failure to provide for a wife or children is however negative, the omission of a duty, and therefore venue depends on the question where the omission to perform that duty occurs."

In the case of *State v. Stone, supra*, the husband was indicted for abandoning and failing to supply the actual necessities of life to his wife. The wife was a native of Lexington County, and upon marriage moved to Aiken County to live with her husband. The husband left his home in

Aiken County and stripped the house of all the furniture. The wife returned to the home of her father in Lexington County. The defendant was indicted in Lexington County and moved to dismiss the indictment on the ground that the Court in said County was without jurisdiction to try the case, because the offense, if any, was committed in Aiken County. The Presiding Judge held that the Court in Lexington County was without jurisdiction and dismissed the case. The State appealed from this ruling. This Court reversed the ruling of the lower Court, and said:

> "Abandonment may be one act, or a continuing act, according to circumstances. The offense is made by the statute a continuing offense. While it is ordinarily true that a husband is only required to furnish the necessities of life at his place of residence, yet, if he destroys his home and provides no other place where she can live, then, from the necessity of the case, she must live where she can live, and the place where she can live is the place where he must provide for her. Mrs. Stone found a home in Lexington County and it was his failure to supply the necessities in Lexington that was a violation of the statute."

In the case of *State v. Free*, 158 S. C. 515, 155 S. E. 838, the defendant was charged with nonsupport of his minor child. It appears that because of the conduct of the husband, the wife left her husband's home and kept the child in her custody. The defendant moved for a directed verdict of "not guilty" on the ground that he was required to support his minor child only at the place of his residence, and that the evidence showed conclusively that the wife had left the home and taken the child with her. The motion was refused, and upon appeal to this Court the judgment below was affirmed and this Court said:

> "The obligation of a husband to his wife is paramount, and it is his duty to provide her a home in accordance with his means, where she may live as the object of his care and comfort, without interference from members of the household; and, if such a home is not provided, the wife is justified in leaving, and not only

is not guilty of desertion in so doing but may charge the husband with constructive desertion'". *State v. Bagwell*, 125 S. C. 401, 118 S. E. 767, 768.

We come now to the practical question of whether the appellant was guilty of such conduct within the family circle as would justify the wife in leaving him and charging him with constructive desertion. If he was guilty of such conduct, and by reason thereof she left him and returned to the home of her mother, it was his duty to furnish her, and the child born after the separation, the necessities of life at the home of her mother in Kershaw County, South Carolina.

We summarize the testimony given by the wife as to her reason for leaving Athens, Georgia, and returning to the home of her mother. She testified that she was in the eighth month of her pregnancy and that on September 22, 1958, that she and her husband got ready to go to bed and "Charles tried to make love to me and I resisted him". She said he became very angry and threw his hand over her face and hurt the side of her face and nose, and that a struggle ensued, and she got up and went to the living room, and the husband pushed her on to the floor. She says that she advised him that she was going to leave him and he got in the bed and laughed and said "Go ahead and leave me. Don't talk about it; do it. I only have to give you $100.00 baby support." She testified that in her pajamas and housecoat she left the home and went to the police station at Athens, Georgia, to find out what could be done about what had taken place. She testified that she resisted the marital advances of her husband because she was in the eighth month of her pregnancy and the doctor had advised her against such. She said she had told him of the advice of the physician that engaging in marital relations might injure her or the life of her unborn baby, but even with such information he tried to force himself upon her. She testified that she left him because she feared for her life and the life of her unborn baby. She further testified that during this same week that her husband came in late and that "I got up and opened the door for him, and got back in the bed to go to sleep, and he was wanting to talk to me, and I was

sleepy, and he kicked me out of the bed, and told me to sleep on the floor." The appellant denied that he attempted to have marital relations with his wife as she had testified. He did admit that he attempted to kiss his wife and she resisted such and left the bed and "ran through the door screaming and hollering and I tried to get her to quit screaming and hollering, and I was embarrased, but she continued to scream and holler. So I put my hand over her mouth for the purpose of quieting her down." The appellant admitted that after the occurrence above related the wife did leave the room and was gone about forty-five minutes or an hour. The testimony shows that the wife left Athens, Georgia, on September 23, 1958, and returned to the home of her mother. She left the appellant a note wherein she stated: "I know I will miss you, but I can't live with you until you change. • • • I can't stand your dirty talk and your mean attitude. I'll be back when you have learned how to treat a wife and have a place for me to live."

While the appellant was under cross examination he was asked about testimony he had given in another hearing. Counsel for the State asked him if he hadn't testified as follows: "Q. And at that time you were attempting to have relations with her, and you knew she was approximately seven months pregnant?"; and your answer was, "Yes, sir." In answer to this question he said, "I was attempting to make love to her." He further testified on cross examination as follows: "Q. All right, sir. Now, Mr. Collins, did you ever spit in your wife's face? A. After she slapped and kicked me. Q. Just answer that 'Yes' or 'No'. Did you ever spit in her face? A. Yes, sir." He further admitted that he slapped his wife when she was about four months pregnant. He says that he did this because she threw a bowl of jello on him and slapped him.

In the charge of the trial judge to the jury they were instructed as follows:

> "Now, I charge you, gentlemen, that a husband has the right to choose the place of abode, that is, where the family shall live. Marriage imposes upon the husband the duty of providing his wife and child with a reasonably adequate and suitable home and support. The wife

owes a reciprocal duty of living with the husband where he has discharged his obligation to provide her with a reasonably suitable home and support. I charge you further that a husband incurs no liability for a failure or refusal to support a wife who has deserted a reasonably suitable place of abode chosen by him, or who, without just cause or excuse, has abandoned his bed and board. The duty of a husband to provide a home not only extends to the furnishing of material comforts in accordance with his means, but requires the husband to furnish a home wherein the wife is free from physical abuse, physical ill-treatment, or violence, and is not such a home as would be intolerable or repulsive to a woman of ordinary and proper sensibilities. If such a home is not provided, the wife is justified in leaving, and is not guilty of desertion, but may charge the husband with constructive desertion. If such a home is not provided, the wife would be justified in refusing to live with her husband. But I charge you that if such a home is provided, or is offered in good faith, it would be her duty to live therein, and she would not in that case be entitled to separate support."

In the case of *State v. Wellman*, 102 Kan. 503, 170 P. 1052, L. R. A. 1918D 949, Ann. Cas. 1918D 1006, it was held that where a wife, after leaving the matrimonial domicile in the State of Missouri, because of the defendant husband's ill treatment, brought the children into the State of Kansas without his knowledge and consent, that the defendant was properly tried in Kansas on a charge of having violated a statute making it a felony for a parent, without lawful excuse, to neglect or refuse to provide for the support of his child under the age of sixteen years, who is in destitute or necessitous circumstances. In support of his contention that the statute was not applicable to him, because of his absence from Kansas at the time of the commission of the alleged offense, the defendant relied upon another Kansas statute, which provided that "every person being without the State, committing or consummating an offense by an agent or means within the State, is liable to be punished by the laws thereof in the same manner as if he were present

and had commenced and consummated the offense within the State." This defense was rejected by the court; it was pointed out that the statute, being only declaratory of the common law, did not purport to enumerate all the conditions under which a person absent from the State might become an offender against its punitive laws, and that, the statutory offense, being essentially one of omission, the aid of supplementary legislation was not needed to bring a person outside of the State within its condemnation. Whether the defendant was answerable to the Kansas court was held to depend upon whether he owed this State a duty to support his children while they were there with their mother. This question was answered in the affirmative, the court saying:

> "If he had sent his wife and children into Kansas, it would hardly be doubted that he became responsible for their care here. If as a result of his wrongdoing they were obliged to leave him and seek refuge elsewhere, the circumstances that they found shelter in a state which undertakes to punish the neglect of parental duty under such circumstances, when they might have chosen one having a different policy in that regard, imposes upon him no hardship of which he has any standing to complain."

We think that the trial Judge was correct in overruling the motion of the appellant which questioned the jurisdiction of the Court of General Sessions of Kershaw County. There is, in our judgment, sufficient evidence in the record showing that the wife left the appellant because of his abuse and ill-treatment of her. Since the appellant did not provide his wife with a home where she was free from physical abuse and ill-treatment, she was justified in leaving, and in so doing, she was not guilty of desertion, but the husband was guilty of constructive desertion. The wife and child were entitled to support by the appellant in Kershaw County because his misconduct had caused her to seek refuge there. The appellant first breached his duty to contribute to the support of his wife and child in Kershaw County, and we think he was properly indicted in said county for this omission. It was his failure to supply the

necessities of life to his wife and child in Kershaw County that was a violation of the statute.

The appellant asserts that the trial Judge committed error in not directing a verdict for him under the facts and the applicable law. It is generally true the husband has the right, acting reasonably, to choose where the family shall reside, and when the wife refuses to go with him she is guilty of desertion. *Wolfe v. Wolfe*, 220 S. C. 437, 68 S. E. (2d) 348, and *Oswald v. Oswald*, 230 S. C. 299, 95 S. E. (2d) 493. However, the wife is not required to live in a home chosen by the husband where she is subjected to physical abuse and ill-treatment. The able trial Judge submitted to the jury the question of whether the wife was justified in leaving the home provided by the appellant. He told the jury that the appellant incurred no liability for the failure or refusal to support a wife who has deserted a reasonably suitable place of abode chosen by him, or who without just cause or excuse has abandoned such home. He likewise charged the jury that if such a home was not provided, the wife would be justified in leaving. Upon this issue the jury has found against the appellant. In our opinion there was sufficient evidence to require the trial Judge to submit this question to the jury. We would point out in this connection that the burden rested upon the appellant to show just cause or excuse for his failure to support his wife and child. *State v. Goins*, 122 S. C. 192, 115 S. E. 232, and *State v. Sutherland*, 217 S. C. 259, 6 S. E. (2d) 591.

The evidence in this case is undisputed that the appellant has not, since September 23, 1958, furnished any support to his wife, nor has he furnished any support to his child since its birth. The bills of the hospital where the child was born, and physicians who attended the child at birth and thereafter, have not been paid by the appellant, nor has he made any contribution of any kind towards his support. The record also shows that the appellant is an able bodied man, and one capable of earning or making a livelihood. The evidence also shows that the wife and child of the appellant are being supported by the mother of the wife. We do not think there was any error committed by the

trial Judge in refusing to direct a verdict of acquittal in favor of the appellant.

A number of the exceptions filed by the appellant charges the trial Judge with error in the admission of testimony. The appellant asserts that it was error to permit the introduction of testimony with reference to his financial condition. The Court permitted the wife to testify that the husband received monthly checks from the Colvis Company, this being a business with which the father of the appellant was connected, and that the appellant had told the witness that he owned a one-eighth interest in said company, which operated twenty-four stores. We think this testimony was properly admitted because it showed that the appellant was earning or making a livelihood. It has been held that it is proper to admit evidence of the amount of the husband's income or earnings, or his earning capacity. *State v. Linck*, 68 Mo. App. 161; *People v. Martin*, 100 Cal. App. 435, 280 P. 151; and 42 C. J. S., Husband and Wife, Section 640 (b), page 299. The testimony was also admissible because when the appellant was upon the stand he testified, in response to questions by his own attorney, as to his earnings. We held in *State v. O'Neal et al.*, 210 S. C. 305, 42 S. E. (2d) 523, that an objection to the admission of evidence is waived where the same or similar evidence has been elicited by the objector. Under this rule the appellant is not in position to complain of the ruling of the trial Judge in admitting the evidence as to his wealth or income. The testimony was also admissible because the appellant testified that he had no way of supporting his wife and child.

The appellant also objected to the questions as to how he had employed counsel to represent him. The appellant testified that he did not pay any of his counsel for their representation. We think that the trial Judge committed no error in permitting this inquiry. It was proper for the appellant to be examined as to his wealth and his ability to support his wife and child.

We have considered the other exceptions posed by the appellant as to the admission of testimony. We find such exceptions to be without merit. Some of these questions had to do with the cross examination of the mother of the ap-

pellant. A review of these questions shows that they were calculated to test the bias, prejudice and interest of the witness. Considerable latitude is allowed in the cross examination of a witness for this purpose. *State v. Thompson*, 118 S. C. 191, 110 S. E. 133.

We should point out also that the admission of evidence is largely within the discretion of the trial Judge, and erroneous exercise of it must be accompanied by probable prejudice to the appellant in order to entitle him to a new trial for the admission of the questioned evidence. *State v. Deas*, 202 S. C. 9, 23 S. E. (2d) 820, and *State v. Gregory*, 198 S. C. 98, 16 S. E. (2d) 532. We have examined the entire record in this case and conclude that the evidence admitted over the objections of the appellant was not prejudicial to him. The exceptions assigning error as to the admissibility of evidence are overruled.

The final question made by the appellant is that the Court committed error in not granting him a new trial. What we have heretofore said disposes of all the exceptions under this question except the one charging error in failing to charge the following request: "Inasmuch as it was brought out in argument we would like to have you charge the jury that the findings of a not guilty verdict in this case would not preclude any other action for support." This question was not argued in the brief of the appellant and we, therefore, consider it abandoned. *Shea v. Glens Falls Indemnity Company*, 228 S. C. 173, 89 S. E. (2d) 221, and *Field v. Gregory et al.*, 230 S. C. 39, 94 S. E. (2d) 1.

In the brief of the appellant under the last question he approves the charge made by the trial Judge, as is hereinbefore quoted, but asserts that the Court should have explained to the jury that such physical ill-treatment, abuse or violence must result in such bodily harm as would affect the life or health of the wife of the appellant. We do not find that this question was raised at the trial. At the conclusion of the charge, the trial Judge gave the appellant opportunity, pursuant to Section 10-1210 of the Code, 1957 Supplement, to request additional instructions. He did not make the request to the trial Judge to instruct the jury in the particular which he now assigns as error. Having failed

to make such appropriate request, he cannot now complain. *State v. Anderson*, 229 S. C. 403, 93 S. E. (2d) 210; *State v. Allen*, 231 S. C. 391, 98 S. E. (2d) 826; *State v. Hollman*, 232 S. C. 489, 102 S. E. (2d) 873.

All exceptions are overruled and the judgment of the lower Court is affirmed.

STUKES, C. J., TAYLOR, OXNER and LEGGE, JJ., concur.